



For the purpose of computing the period of stay in India to determine the residential status of an individual, visits to India of an occasional or casual nature while on deputation abroad is to be excluded. Further, while calculating the total number of days spent in India, the day of arrival is to be excluded and the day of departure should be included.

Background

The Income-tax Appellate Tribunal, Bangalore¹ has held that for determining the residential status of an individual, visit to India should be excluded while computing the period of 60 days in India as mentioned in Section 6(1)(c)² of the Income-tax Act, 1961, ('the Act'). Further, it also held the day on which the individual arrived in India is not to be considered for calculating the total number of days in India. The Tribunal has also ruled upon certain other related issues.

Facts of the case

- M/s IBM Global Services India Pvt. Ltd. seconded its employee ('assessee') to IBM Global Service Customers, US in February 2004.
- The assessee continued to be an employee of IBM Global Services India Pvt. Ltd.
- The assessee was present in India for a total period of 78 days

¹ The IncomeTax officer (International Taxation) , Bangalore v. Shri Manoj Kumar Reddy Nare (ITA No. 1020/Bang/2008)

² Section 6 (1)(c) : An individual is said to be resident in India in any previous year, if he having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

during the tax year 2004-05³. This included a stay from 18th August 2004 to 6th September 2004 in India when the assessee was on a visit.

- Subsequently during the same tax year, the assessee permanently came back to India on 31 January 2005 after the end of his US assignment.
- The assessee had spent 365 days or more in India during the four immediately preceding tax years.
- While on secondment, the assessee was not paid any salary in India.

Issues before the Tribunal

- Whether the threshold limit of 182 days, instead of 60 days, is applicable for an individual only in the tax year in which he leaves India for the purpose of employment outside India as per Explanation (a) to Section 6(1)(c)⁴?
- Whether the threshold limit of 182 days is applicable as per Explanation (b) to Section 6(1)(c)⁵ instead of 60 days in a tax year in which the individual visits India and subsequently returns permanently to India in the same tax year?
- Whether for computing the threshold limit of 60 days for the purpose of Section 6(1)(c) of the Act, the period of visits to India are to be excluded?
- Whether the first day of arrival in India is to be excluded for computing the total number of days spent in India?
- Whether salary received in the US will be taxable in India?
- Whether interest u/s 234B of the Act for failure to pay whole or part of the advance tax be computed before giving credit for relief of taxes paid in another country?

³ India tax year: 1 April to 31 March

⁴ Explanation (a) to Section 6 (1)(c) : In the case of an individual being a citizen of India, who leaves India in any previous year.....for the purpose of employment outside India ,the provisions of sub-clause (c) shall apply in relation to that year as if for the words “sixty days”, occurring therein, the words “one hundred and eighty-two days” had been substituted.

⁵ Explanation (b) to Section 6 (1)(c) : In the case of an individual being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) to Section 115C, who being outside India, comes on a visit in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words “sixty days”, occurring therein, the words “one hundred and eighty-two days” had been substituted.

Tax payer's contention

- The residential status of the assessee was that of a 'non-resident' in view of Explanation (b) to Section 6(1)(c) of the Act, as he had come to visit India and had stayed for only 78 days during the said tax year. Further, the fact that he had permanently shifted to India in January 2005 in the said tax year itself does not alter the above position. Accordingly, the threshold for test of residency would be 182 days and not 60 days in India.
- The assessee raised an alternate contention regarding his residential status. The assessee contended that the 60 days referred to in Section 6(1)(c) of the Act should exclude the period of visits in India (i.e. . the stay from 18th August 2004 to 6th September 2004 in India when the assessee was on a visit).
- The second alternate contention of the assessee was that the fraction of a day is not to be considered for determining the total period of stay in India. Hence the date of arrival i.e. 31 January 2005 should be excluded for the purpose of calculation of the days spent in India.
- Accordingly, his stay in India during the said tax year is 59 days only (i.e. from 1 February 2005 to 31 March 2005) and therefore, he is a non-resident during the said tax year.
- The assessee contended that he was a resident of US as per the tie breaker rules of the India – US Double Taxation Avoidance Agreement (DTAA),
- The assessee contended that as per the DTAA, salary received in US was not taxable in India as he was entitled to claim credit for taxes paid in the US.

Assessing officer's (AO) contention

- The assessee had left India for the purpose of employment during the tax year 2003-04 in February 2004 (i.e. start date of his assignment). Therefore, explanation (a) to Section 6(1)(c) would not be applicable for the tax year 2004-05 as he had not left India for employment purpose, in that tax year.

Accordingly, the assessee would be a resident in accordance with Section 6(1)(c) of the Act as he was present in India for more than 60 days during the said tax year and more than 365 days in the four tax years preceding that year. In view of the above, the salary paid to the assessee during the deputation period is taxable in India.

- The assessee is also a resident of India as per the provisions of the DTAA.
- It was contended that Explanation (b) to Section 6(1)(c) of the Act is also not applicable in the instant case as the assessee is not a person of Indian origin within the meaning of explanation to Section 115C of the Act.

- In respect of whether the period of visit to India should be excluded from the number of days in India, the AO argued that the relevant clause in the Act does not distinguish period of stay in respect of the purpose of visit. Therefore, the period of stay may include the period of visit and also may relate to permanent shifting to India.
- The fraction of a day is to be included while computing the total number of days spent in India as there is no provision under the Act for specific exclusion of the same.
- The AO argued that the assessee was taxable in India for the salary received in the US though it might have been taxed there as well.

Decision of Commissioner Income-Tax (Appeals) (CIT)

- The assessee had left India in an earlier previous year i.e. during tax year 2003-04 for employment outside India and not the tax year 2004-05, which is under consideration. Therefore, Explanation (a) to Section 6(1)(c) of the Act is not applicable in the instant case.
- It was held that Explanation (b) to Section 6(1)(c) of the Act is not available to the assessee to claim relief.
- In view of the above, the assessee would be resident in India under the Act.
- As the assessee was resident of both India and US, his residential status would be determined in accordance with Article 4(2) of the Indo- US DTAA.
- It was concluded on facts that the assessee had no permanent home in either states. However as his habitual abode was in India as his family was in India, hence, the assessee was a resident in India.
- As regards taxability of salary received in the US, the finding of the AO was confirmed.
- The CIT also computed interest under Section 234B of the Act before giving credit for relief under Section 90(2) of the Act.

The Tribunal Ruling

- The Explanation (a) to Section 6(1)(c) of the Act would be applicable for the previous year in which the assessee, being a citizen of India, leaves India for employment purpose and not for any subsequent year thereafter. Hence, the above explanation (where 182 days is substituted for 60 days) is not applicable in the instant case.
- The Explanation (b) to Section 6(1)(c) of the Act would be applicable and the threshold limit of 60 days would be substituted for 182 days only if all entries into India are for visit purpose only. However, in the assessee's case, as he came to India permanently in

the same tax year after leaving his employment outside India, the said Explanation would not apply, even if he was on visit to India prior to the termination of the overseas assignment. Therefore the threshold for residency is 60 days and not 182 days.

- Considering the legislative history, in order to compute 60 days as mentioned in Section 6(1)(c) of the Act, the period of stay on visits to India should be excluded.
- The Tribunal relied on the General Clauses Act, 1887⁶ for computing the total number of days spent in India. The first day in a series of days is to be excluded and the last day in a series of days will be included for the purpose of calculating the total number of days spent in India.
- Accordingly, the assessee's stay in India was to be considered as 59 days during tax year 2004-05 after excluding the period of visits to India and also the day of arrival into India.
- In view of the above, the assessee would be a non-resident in India under the Act.
- In order to determine the residential status of the assessee as per the tie-breaker rules, under the DTAA, the permanence of home is essential for both the assessee and his family.
- The home in India where the assessee's family is staying can be considered as permanent home in the same manner in which a rented house for the assessee in the US is considered as a permanent home.
- It was concluded that the assessee has permanent home available in either states, however his personal and economic relations and habitual abode are closer to India. Accordingly, it was concluded that the assessee was a resident in India under the DTAA even though it was already held that he was a non-resident under the Act.
- It was held that if the assessee is a resident of India as per the DTAA his income in the US is taxable in India and he will be entitled to relief under Article 25 of the DTAA. However since in the instant case, it is already held that the assessee is not a resident of India as per the Act, accordingly the salary income received in the US for services rendered there is not taxable in India.
- The assessee is not required to pay the interest on tax for which he going to get the credit. Therefore, interest u/s 234B is to be charged after giving the credit of taxes paid in US under Section 90 of the Act.

⁶ Section 9

Our Comments

This judgement highlights that if a person permanently returns to India from his overseas assignment then he will be considered as a resident in India if he crosses the 60 day mark in relevant tax year and 365 days in the previous four tax years. This is despite the fact that he had earlier been to India on visits in the same tax year. Therefore for returning Indian assignees, it is to be remembered that even a low threshold of 60 days in their year of permanent arrival to India can otherwise trigger residency in India if the stay in the past was substantial.

It is also important to note that as per this judgement the date of arrival is to be excluded while computing the number of days in India. This ruling however does not make a reference to an earlier Advance Ruling (223 ITR 462) which had counted both the date of arrival to India and departure from India as two separate days in India for the purpose of ascertaining residency in India.

It is also pertinent to note that for the purpose of ascertaining the 60 day rule, the Tribunal has excluded the period of stay on visits to India. The legislative history under the provisions of the 1922 Act has been referred to in arriving at this conclusion.

The provisions of section 4A(iii) of the Income-tax Act, 1922 specifically excluded the period of stay spent on occasional or casual visits for computing 365 days in past four years. However, there is no such similar wording or exclusions in the provisions of Section 6(1)(c) of the Act.

Disclaimer

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

For further information about KPMG in India and our services, please contact:

Bangalore

Maruthi Infotech Centre, 11-12/1
Inner Ring Road
Koramangala, Bangalore 560071
Phone: + 91 80 3980 6000 Fax: +91 80 3980 6999

Chennai

KPMG House
No.10, Mahatma Gandhi Road,

Nungambakkam High Road,
Chennai 600034
Phone: +91 44 39145000 Fax: +91 44 39145999

Delhi

DLF Cyber City, Building no. 10, Block B, Phase II
Gurgaon, Haryana 122 002
Phone: +91 124 307 4000 Fax: +91 124 254 9195

Hyderabad

KPMG, 8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad - 500 034
Phone: +91 40 66305000/23350060 Fax: + 91 40 6630 5299

Kolkata

Park Plaza, Block F, Floor VI
71 Park Street, Kolkata 700 016
Phone: +91 33 2217 2858 / 64/62 Fax: +91 33 2217 2868

Mumbai

KPMG House, Kamala Mills Compound, 448 Senapati Bapat Marg
Lower Parel, Mumbai 400 013
Phone: +91 22 39896000 Fax: + 91 22 39836000

Pune

703, 7th Floor Godrej Castlemaine, Next to Ruby Hall Clinic,
Bund Garden Road, Pune 411001
Phone: +91 20 30585764/65 Fax: +91 20 3058 5775

Kochi

4/F, Palal Towers
M. G. Road, Ravipuram,
Kochi 682 016
Tel: +91 484 309 4120
Fax: +91 484 309 4121